

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 24 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

HUGH WEISS; et al.,

Plaintiffs - Appellants,

v.

KUCK TRUCKING INC., a Montana
corporation,

Defendant - Appellee.

No. 04-35547

D.C. No. CV-00-00123-BLG-JDS

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted January 9, 2006
Portland, Oregon

Before: KLEINFELD and GRABER, Circuit Judges, and RAFEEDIE^{***}, District
Judge.

The complaint filed in state court made no federal claim. Although it
mentioned federal law, it did not make a claim for relief based on violation of

* This disposition is not appropriate for publication and may not be
cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

*** The Honorable Edward Rafeedie, Senior United States District Judge
for the Central District of California, sitting by designation.

federal law. The closest it got was to suggest that violation of federal law could support negligence per se under Montana law in a state tort claim for relief. That is not a federal claim.

It is true that the EPA had already commenced remedial action. The action that had been commenced was a “remedial investigation/feasibility study,” which we held in Razore v. Tulalip Tribes amounted to remedial action.¹ But the complaint filed in state court did not amount to a “challenge to remedial action,” because to qualify as a “challenge,” the claim must be “directly related to the goals of the cleanup itself.”² The complaint did not directly relate to the goals of the cleanup and in no way challenged anything about the “remedial investigation/feasibility study” in which the EPA engaged. This case is controlled by Beck v. Atlantic Richfield Co., because in this case as in Beck, the plaintiffs’

¹ Razore v. Tulalip Tribes of Wash., 66 F.3d 236, 239 (9th Cir. 1995).

² Fort Ord Toxic Projects, Inc. v. Cal. E.P.A., 189 F.3d 828, 831 (9th Cir. 1999)(internal quotation marks omitted).

alleged causes of action are based entirely on state law and do not challenge any CERCLA³ cleanup plan.⁴ Therefore, the district court lacked jurisdiction.

The amicus makes the practical argument that the damages action in state court has the potential to draw money out of the case and, without money to implement it, a potential cleanup may be thwarted as a practical matter. But under the well pleaded complaint rule, except where the artful pleading doctrine compels an exception, the plaintiff is the master of his complaint. In this case, as in Rains v. Criterion Systems Inc.,⁵ there is nothing that would justify recharacterizing the state law claims as federal claims. The relevant federal claim would be a challenge to the EPA's CERCLA proceedings, and there is no such claim in the complaint. Notwithstanding the amicus's argument, the statute expressly precludes us from adopting it because "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with

³ Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675 (1986).

⁴ Beck v. Atlantic Richfield Co., 62 F.3d 1240, 1243 (9th Cir. 1995) (per curiam); see also ARCO Env'tl. Remediation, LLP v. Dep't of Health and Env'tl. Quality of the State of Montana, 213 F.3d 1108, 1115 (9th Cir. 2000); Stanton Road Assocs. v. Lohrey Enters., 984 F.2d 1015, 1021-22 (9th Cir. 1993).

⁵ Rains v. Criterion Sys., Inc., 80 F.3d 339, 344 (9th Cir. 1996).

respect to the release of hazardous substances within such State.”⁶ If indeed a risk of double payment is posed by the relief granted in state court, the district court has the means to avoid unfairness because “the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”⁷

Removal was improvident and the district court must remand the case to the state court from which it came.

REVERSED and REMANDED with instructions to the district court to remand the case to the state court.

⁶ 42 U.S.C. § 9614(a).

⁷ 42 U.S.C. § 9613(f); W. Props. Serv. Corp. v. Shell Oil Co., 358 F.3d 678, 690 (9th Cir. 2004).